No. 76-1105

# In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMSEY CLARK, APPELLANT

*v.*

J. S. KIMMITT, SECRETARY TO THE UNITED STATES SENATE, EDMUND L. HENSHAW, JR., CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AND FEDERAL ELECTION COMMISSION, APPELLEES

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL AND BRIEF IN OPPOSITION TO CERTIORARI

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Appellee Federal Election Commission, moves to dismiss this case on the ground that the appeal is not "within the jurisdiction of this Court, because not taken in conformity to statute." Rule 16(1)(a). Treating appellant's papers as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 2103, the Commission submits that the petition should be denied.

**QUESTIONS PRESENTED**

Does Section 314 of the Federal Election Campaign Act provide for appeal of a dismissal of an action for lack of jurisdiction over an Article III case.

Are the issues related to Commission submission of regulations to Congress so clear and substantial that this case warrants review even where no Commission regulation has been disapproved, no court has ruled on the issues, and the court below found no Article III case existed, and ruled that it would have refused in the exercise of judicial prudence to rule on the issues in any event.

## STATUTE INVOLVED

The Federal Election Campaign Act, of 1971, as amended, 2 U.S.C. § 431 *et seq.* (P.L. 92–225, P.L. 93–443, P.L. 94–283). Brought into question is Section 314 (formerly Section 315) of that Act, 2 U.S.C. § 437h, which states:

> § 437h. Judicial review
>
> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United



> State. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

## STATEMENT OF THE CASE

On July 1, 1976, appellant Clark filed complaint in the district court seeking a declaration that the "provisions allowing bodies of Congress to disapprove of regulations adopted by the Federal Election Commission are repugnant to the Constitution * * *"Appellant sought an injunction prohibiting transmission of the rules to Congress and an order directing the Commission to prescribe rules adopted by it (App. Vol. I, pp. 21a–22a). Under 2 U.S.C. § 437h, appellant sought immediate certification to the Court of Appeals of constitutional questions.

Appellant thus sought to bar the Commission from complying with the provisions of 2 U.S.C. § 438(c) for the regulations it was then drafting.[1] Those regu-

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[1] Appellant also simultaneously challenged the transmission to Congress of all rules relating to financing of presidential primary and general elections, pursuant to Chapters 95 and 96 of Title 26, United States Code, by way of applications for a three judge court pursuant to 26 U.S.C. § 9011(b) (Chapter 95) and 28 U.S.C. § 2282 (Chapter 96). Dismissal of the case for lack of ripeness insofar as it relates to these provisions is not presently before this Court, since appellant Clark withdrew the appeal from the three-judge order which he had originally lodged with this Court, and has now filed a notice of appeal from that judgment to the Court of Appeals.

lations, initially published in the Federal Register on May 26, 1976, for comment, were the subject of hearings during June and July of 1976. The Commission's proposed regulations were transmitted to Congress on August 3, and published as the Commission's interpretation of the law on August 25, 1976, Federal Register, pp. 35932–35976. None of the regulations were disapproved by either House of Congress, but when the 95th Congress adjourned on October 1, 1976, thirty legislative days—days when both Houses of Congress were in session—had not yet passed. Accordingly, the regulations were resubmitted to the 96th Congress on January 12, 1977. Thirty legislative days passed on March 29, 1977. On April 7, 1977, the Commission voted to prescribe the regulations.

The Federal Election Commission filed an opposition to plaintiffs various motions, including opposition to the motion for immediate certification on the grounds, *inter alia,* that there was no case or controversy within the meaning of Article III. Oral argument on the motion for immediate certification of three proposed constitutional questions was held before the district court on August 13, 1976.

By order of August 13, 1976, the district court concluded that it should not hear and decide the Article III standing and ripeness issues, but ordered any motions on these grounds to be filed by August 18, 1976. On August 22, 1976, the Attorney General, acting on behalf of the entities represented by the United States, namely, the President of the United States



and the Executive Branch, was permitted to intervene as a party plaintiff, to attack the constitutionality of the challenged provisions. Pursuant to the court's direction, the parties on September 2, 1976, stipulated to facts necessary to decide constitutional questions as then jointly proposed by plaintiff and the United States, as intervenor. By order of September 3, 1976, the court refused to rule on any jurisdictional issues, adopted the stipulated facts as findings of fact, and certified to the court of appeals with minor modifications, the five proposed certified questions.

By order of September 3, 1976, the court of appeals preliminarily deemed the matter properly certified, set an *en banc* hearing on the matter for September 10, 1976, and called for briefs by September 8, 1976, on the certification, noting that "the parties having addressed these questions in their presentations to the District Court such expedition should not be unduly burdensome." Plaintiff and Plaintiff intervenor filed briefs addressing the certified questions. Defendants filed briefs on the arguments presented to the district court relative to the certification procedure under 2 U.S.C. §437h, arguing the impropriety of certification where there was no case or controversy. On January 21, 1977, the court, *per curium,* returned the questions to the district court unanswered, with directions to dismiss because the matter before them "does not present a ripe 'case or controversy' within the meaning of Article III." That court also noted that it would have dismissed the action as a matter of judicial prudence,

even if it had concluded that there was a case within the meaning of Article III.

On February 9, 1977, Ramsey Clark, plaintiff below, docketed in this Court a jurisdictional statement for an appeal. Appellees' time to file their responses to the jurisdictional statement was extended to April 8, 1977.

## ARGUMENT

### I. THE APPEAL IS NOT TAKEN IN CONFORMITY TO THE STATUTE BECAUSE SECTION 314 OF THE FEDERAL ELECTION CAMPAIGN ACT PROVIDES ONLY FOR AN APPEAL OF A DECISION ON CERTIFIED QUESTIONS OF CONSTITUTIONALITY OF THE ACT NOT FOR APPEAL OF DECISIONS FOR LACK OF JURISDICTION

There has been no decision on matters certified under the review provision contained in Section 314 of the Federal Election Campaign Act of 1971, as amended, which provides for review by appeal to this Court only from a Court of Appeals "decision on a matter certified under subsection (a) of this section." 2 U.S.C. § 437h(b).[2] Subsection (a) provides for actions "appropriate to construe the constitutionality of any provision of this chapter." The court of appeals simply rejected the idea that this action was appropriate for deciding certified constitutional ques-

[2] The 1976 amendments to the Federal Election Campaign Act of 1971 ("FECA") renumbered former Section 315, making conforming changes but leaving it substantively identical to the provision under which this Court reviewed *Buckley* v. *Valeo*, 424 U.S. 1 (1976) P.L. 94-283, Title I, Sections 105, 115, 90 Stat. 481, 496.



tions, ruling that it did not present "a ripe justiciable 'case or controversy' which would permit this court to reach and decide the merits" of the certified constitutional questions. And it added that the action—with its complete lack of a concrete factual setting to illuminate the operation of the challenged statutory provisions—would be inappropriate for examining the delicate problem of whether the checks and balances between the executive and legislative branches have been upset and one allowed to exercise power reserved to the other, even if the necessary ripeness were found to exist.

The clarity of the statute's command that only questions about the constitutionality of substantive provisions demand appellate review by this Court appears from the statutory and historical context of 2 U.S.C. § 437h as well. That provision was offered by Senator Buckley as a substitute for his defeated amendment to abolish the contribution and expenditure limitations. Introducing that amendment, Buckley stated only that it provided

> "for the expeditious review of the constitutional questions I have raised. I am sure that we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time." 120 Cong. Rec. S. 5207.

The provisions of 2 U.S.C. § 437h were extraordinary provisions designed to test the basic constitutionality

of the Act—not ones designed to provide such extraordinary treatment for ancillary questions of justiciability.

Appellant's argument that the statute envisages direct appellate review by this Court of any decision which was rendered in an action brought under Section 314 is untenable. Appellant argues that this Court's appellate jurisdiction is invoked because the court below "in fact did decide the first question" (Jurisdictional Statement, p. 3)—the Article III question which the district court certified, rather than rule whether there was a case over which it had jurisdiction. Thus, the logic of the position is that the court of appeals' decision that there was no case over which it could exercise jurisdiction within the meaning of Article III of the United States Constitution does not stand between a party and appellate review by this Court. In the Commission's view, there is no support for the proposition that the Congress intended direct appeal to this Court to follow from a single judge's decision, however erroneous, to certify constitutional questions.

Axiomatically, a federal court cannot be given the power to decide a matter which is not a case or controversy, *Muskrat* v. *U.S.*, 219 U.S. 346 (1911); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240–241 (1937). Thus, had the district court concluded that it could not certify a question because no case or controversy existed, no argument would hold that that determination was itself appealable of right to the



court of appeal *en banc* and then to this Court. The statute itself explicitly provides these special procedures for "all questions of constitutionality of this Act." 2 U.S.C. 437h(a). There is nothing to suggest that the mere assertion of a constitutional claim by a plaintiff mandates *en banc* treatment. And yet here, appellant's assertion that he has a case is postulated as requiring this Court to exercise its appellate jurisdiction.

Appellant cites little support for a proposition so unusual—indeed, unique—in American jurisprudence. Appellant cites no reason that Congress felt direct appeal to the Supreme Court should flow from a single judge's certification of questions. Congress chose for review of the financing of presidential elections the more traditional route for assuring appeal to this Court—the three-judge court. 26 U.S.C. §9010(c); 26 U.S.C. §9011(b)(2). Under that traditional route for direct appeal to this Court from federal court determinations on constitutional questions, no direct appeal would lie. *Dickson* v. *Ford*, 419 U.S. 1085 (1974); *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975); *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90 (1974). The statute itself provides the extraordinary protection of *en banc* review by the court of appeals, with no suggestion that it cannot exercise the power clearly placed in the district court to decide that an action is inappropriate for deciding of questions. No statutory history is cited to support the proposition. Virtually the only statutory history of the

provision, quoted above, p. 7 supports the view that the extraordinary review provisions were provided only for serious questions of the constitutionality of substantive provisions of the Act, which would surely be those that the *en banc court* found.

In sum, the Federal Election Commission submits that the decision of a court not to answer certified questions, on such grounds as lack of ripeness and exercise of judicial prudence is simply not an appealable determination under Section 314. Subsection (b) limits this Court's appeal jurisdiction to determinations regarding the constitutionality of some provision of the Act, not to general matters of justiciability.

## ARGUMENT

### II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE UNANSWERED QUESTIONS WHERE THERE IS NO RECORD EVIDENCE PERTAINING TO THE EXERCISE OF THE CHALLENGED POWER, THERE IS NO OPINION OF ANY COURT BELOW UPON THE ISSUES SOUGHT TO BE REVIEWED AND THOSE ISSUES RELATE TO COMPLEX AND SENSITIVE QUESTIONS OF THE RELATIONSHIP OF DELEGATED POWERS TO THE DOCTRINES RELATING TO SEPARATION OF LEGISLATIVE FROM EXECUTIVE POWER

Treated as a petition for certiorari, appellant's papers would seem properly to raise only the issues of ripeness decided by the court below. Appellant, however, never directly addresses his papers to the decision of the court of appeals on that issue, choosing rather to argue to this Court that the ripeness issue is essentially irrelevant by arguing that it is



impossible that any relevant facts could be adduced or arguments perceived by courts or litigants. In effect, appellant essentially argues that immediate decision of the issues raised is so important that this Court should depart from its usual rule of only deciding constitutional questions when an irreducible conflict between parties makes such decisions absolutely necessary. See, e.g., *United States* v. *Raines*, 362 U.S. 17, 21 (1960). The Commission submits that several factors should lead this Court to conclude that it should adhere to that traditional reluctance in this case.

As to the importance of immediate decision, appellant argues that the variety and increase of Congressional review provisions inserted in statutes delegating powers to many different agencies, both independent and executive, over a multitude of different kinds of actions, itself is reason for a declaration of guidance by this Court on the issue. Yet appellant's own papers both admit and demonstrate that there is not a single issue because different statutes raise different issues. Even a cursory glance at the variety of opinions from legislators, administrators, judges and legal scholars confirms the possibility that different considerations will apply to disapproval of different actions by the Congress. (J.S. pp. 28–32). Indeed, while chastizing appellants for not submitting briefs to the court below related to the Pay Act cases, he accepts as tenable the proposition, recently advanced by the present Attorney General (Letter to the President, January 31, 1977), that

Congressional disapproval of Reorganization Act plans is constitutional and raises far different considerations than other disapproval mechanisms. And the comparative similarity of the Pay Act and Reorganization Act statutes, where direct executive action can be reviewed and blocked, in comparison to FECA, where proposed rules of an independent agency are subject to disapproval, highlights the attempt to oversimplify the complex.

In fact, the nub of appellant's argument seems to be that none of these provisions will be illuminated by a factual examination of their exercise. That is, of course, to assume that neither the nature of the action reviewed nor any Congressional statement as to the nature of its disapproval could be relevant. And that is also to say that the nature of the power delegated—whether it is quasi-judicial, quasi-executive, quasi-legislative, or purely administrative—is not relevant. In this analysis, the nature of a Commission rule subject to Congressional disapproval—whether, for instance, it repeated the statute, interpreted more precisely broad terms of the statute or set forth procedural rules—would not be relevant. To the contrary, it is on precisely such factual considerations that the appropriateness of such delegations by Congress to other institutions of government have always turned. See, generally, Jaffe, *Judicial Control of Administrative Action,* Chapter 2 (Little Brown & Co., 1965).[3]

[3] Appellant's characterization that the court below misconstrued this Court's refusal in *Buckley* v. *Valeo*, 424 U.S. 1 137, n. 175 (1976), to consider the Congressional veto problem "due to considerations of ripeness" seems inaccurate. While this Court's reason for not reaching that issue was that it need consider only whether the powers were not exercisable in full by an agency whose members were not appointed in accordance with the Appointments Clause, it specifically let stand the decision by the court of appeals, essentially reaffirmed here, that "the failure of the plaintiffs to present a concrete set of facts in which the court could analyze the nexus between each specific power" and the exercise of the delegated functions made the question unripe for review. *Buckley* v. *Valeo*, 519 F. 2d 829, 896 (C.A.D.C., 1975).



Appellant's ultimate assertion is that the issue of the unicameral Congressional "veto" of Commission regulations is so important and self-evident that this Court should consider the issues raised and attempt to resolve them, despite the lack of consideration by any court below. The extraordinariness of such a request places on appellant a substantial burden of justification. The Commission's regulations have now lain before Congress for the thirty-day period, none have been disapproved, and the Commission has prescribed them, effectuating the ultimate relief sought by appellant in his complaint. Admitting that the election laws are unique, appellant presses this case upon the Court, though the Federal Election Commission, as the agency empowered to enforce the election laws through court actions and consent agreements, and with the aid of policy statements, advisory opinions and regulations, has never addressed the question of the effect upon its powers of the exercise, potential or actual, of a unicameral veto.[4]

[4] Appellant asserts that the Commission "chose" not to brief the issues raised by the Congressional disapproval mechanism before the court of appeals. The Commission read the order of the court below to call only for briefs on the issues addressed before the

In such circumstances, review of this case will not contribute to effective functioning of the Federal Election Commission. Of course, any future regulations of the Commission will be subject to the unicameral disapproval procedure. That Congress may, however, in the future exercise the disapproval power does not make this case an appropriate vehicle for consideration of such complex issues. Should such a case arise, the Commission could address itself before the appropriate forum to the issues raised by a veto and its effect upon the statutory scheme. Resolution of the problems raised by Congressional attempts to provide statutory review over powers delegated should await a case by individuals affected by the exercise of such review.

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district court, and so stated in its submission. The court of appeals, in the four months the matter lay pending before it, never asked for briefs on the constitutional questions.

## CONCLUSION

For the reasons stated, this Court should dismiss the appeal as not within the jurisdiction of this Court, because not taken in conformity to statute, and should refuse to issue a writ of certiorari.

Respectfully submitted,

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